The contract of sale was subject to ICC approval of the management contract in accordance with 49 U.S.C. § 310a(b) and ultimate approval of the sale itself as required by 49 U.S.C. § 5. Appropriate applications were made to the ICC. On May 21, 1959, the Commission by order granted the application under § 310a(b) stating in part: "The Adley Express Company be, and it is hereby, authorized to control McFaddin Express, Inc. through management for a period not exceeding 180 days, beginning with the date hereof, unless otherwise ordered, upon the terms and conditions set forth in the agreement filed with the application." (Ex. A, par. 4) This order was later extended.

Serious disagreements occurred between the parties concerning, among other things, the accuracy of the guaranteed balance sheet dated December 31, 1958 and the respondents' claim that the subsequent audits disclosed a substantial decrease in the net worth far exceeding the agreed purchase price of $125,000. The Federal Government instituted suit on October 20, 1960, for foreclosure of tax liens aggregating $198,079.40 on McFaddin's franchise and other property, and when a judgment of foreclosure was entered on November 28, 1961, McFaddin's franchise was sold. *United States* v. *McFaddin Express, Inc.*, 310 F.2d 799, 800 (2d Cir. 1962). McFaddin's service thereupon became largely dormant.

On two separate occasions in 1961 and 1963, the ICC denied approval of the acquisition. Although Adley first sought denial of the application for approval, it later urged approval to avoid litigation. *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 425 n.1 (2d Cir. 1965). The Commission in a final ac-

tion on May 15, 1964, denied approval. (Ex. B). It earlier stated that the disputes between the parties "are not matters requiring resolution by us . . . This long standing controversy is, as was stated in the prior report, a matter for the courts to decide if the parties cannot otherwise resolve the controverted matter." 93 M.C.C. 378, 382. The management contract terminated in August of 1964.

A prior action, also claiming more than $5,000,000 damages, was brought by the present plaintiffs against the present defendants on December 14, 1964, by a complaint containing five counts, 133 paragraphs and twelve prayers for relief. The plaintiffs sought enforcement of an "order" of the Interstate Commerce Commission dated May 21, 1959, authorizing temporary management under 49 U.S.C. § 310a(b), and also claimed damages for violation of that order. They also claimed damages for violation of various sections of the Interstate Commerce Act. That action was dismissed specifically for lack of federal question jurisdiction, without prejudice to its being brought in an appropriate forum. *McFaddin Express, Inc.* v. *Adley Corp.*, 240 F. Supp. 491 (D. Conn. 1965), affirmed, 346 F.2d 424 (2d Cir. 1965), certiorari denied, 382 U.S. 1026.

Before filing their first petition for a writ of certiorari on August 24, 1965, the plaintiffs instituted an identical action on July 12, 1965, in the Superior Court of Connecticut, (*McFaddin Express, Incorporated, et al.* v. *The Adley Corporation, et al.*, No. 8503, Fairfield County at Stamford), which is now pending.*

* Judge Blumenfeld in the District Court, before dismissing the first action, had granted a temporary restraining order against

Also, before filing their first petition for certiorari, on July 25, 1965, the petitioners instituted the present action in the United States District Court for Connecticut which was dismissed by Judge Blumenfeld for lack of jurisdiction on October 28, 1965. (App. Petitioners' Br. p. A12)

The Second Circuit dismissed the appeal for lack of jurisdiction. (App. Petitioners' Br. p. A1) Judge Friendly's opinion did not discuss whether the ICC order permitting operation under 49 U.S.C. § 310a granted an exemption from 49 U.S.C. § 5 but held that in any event no private right of action for violation of 49 U.S.C. § 5(4) existed. *McFaddin Express, Inc.* v. *Adley Corp.*, — F.2d —, (2d Cir. 1966). Judge Lumbard, concurring in the result, held that dismissal was appropriate "because in this case the ICC granted an exemption from § 5 pursuant to § 310a . . . ." He interpreted the complaint therefore "as alleging a violation of the limited authority granted by such approval", and found no statutory private right of action for such a suit. Id. at —. If either of the views of the members of the court is sound, certiorari should be denied.

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attachment under Rule 65(b) F.R.C.P. which the respondents sought on the ground of excessive and harassing attachment and refusal to accept a reasonable bond. Upon the dismissal of the first District Court action the respondents instituted a State Court action and secured an injunction against attachment without prior opportunity to post bond. The petitioners' attempt to have this action dismissed was denied by the Superior Court and the Supreme Court of Connecticut dismissed petitioners' appeal. 213 A.2d 312. This action is still pending in the Superior Court for New Haven County.

ARGUMENT

I

The order of the ICC under 49 U.S.C. § 310a granted an exemption from the prohibition of 49 U.S.C. § 5.

As Judge Friendly for the Second Circuit pointed out in the first decision, the order of the ICC "authorized" Adley to manage and control the plaintiff corporation in accordance with the terms of their contract. The Court said:

> "The order is permissive only, in effect granting a temporary exemption from the prohibition of 49 U.S.C. § 5. If Adley had never assumed the permitted temporary control it would have violated its contract but not the order. And if Adley did control McFaddin other than upon the terms and conditions set forth in the agreement filed with the application, perhaps Adley forfeited its exemption from § 5, but again it has disobeyed no express command of the ICC. Doubtless the commission does expect that a carrier authorized to exercise temporary control will use this permission in accordance with its agreement, so as to enable the controlled carrier to resume independent operation if approval under § 5 is ultimately denied. But we do not feel justified in reading the bland language of the order so that these expectations become ICC commands, especially when the commission has been at such pains to make clear that it considers the private disagreements of the parties not to be its concern. . . ." *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965), certiorari denied, 382 U.S. 1026.

Judge Lumbard was a member of the panel on each appeal. In the second appeal, Judge Lumbard's concurring opinion again points out: "I think dismissal is appropriate, however, because in this case the ICC granted an exemption from § 5 pursuant to § 310a; interpreting the complaint, therefore, as alleging a violation of the limited authority granted by such approval, I do not find any statutory private right of action for such a suit." *McFaddin Express, Incorporated* v. *Adley Corporation*, — F2d —, ———— (2d Cir. 1966). It is true that in the second appeal Judge Friendly did not reiterate his views as to the effect of an order under 49 U.S.C. § 310a —— it was hardly necessary to do so—but he held that in any event there was no private right of action for damages created for violation of 49 U.S.C., § 5.

Inasmuch as Judge Friendly in the second decision found no occasion to change his prior holding and Judge Lumbard's opinion reaffirms the holding of the first decision, both decisions are consistent in holding that no private right of action arises under 49 U.S.C. § 5 in view of the exemption granted by 49 U.S.C. § 310a.

II

The Motor Carrier Act does not grant a private right of action and none should be implied.

Part II of the Interstate Commerce Act, 49 U.S.C. §§ 301-327, known as the Motor Carrier Act, contains no provision granting private parties a right to bring suit for claimed violations of its provisions allegedly resulting in the unlawful control of one motor carrier

by another. The conspicuous absence of such a provision is significant in light of the fact that Congress has provided private remedies for certain violations of other parts of the Interstate Commerce Act. 49 U.S.C. §§ 8, 9.

The Motor Carrier Act does provide, however, in 49 U.S.C. § 322 (b), that the Commission may apply to any district court of the United States to enforce provisions of that chapter. The fact that Congress omitted a provision for a private right of action to enforce alleged violations of the chapter is explained when the bill which became the Motor Carrier Act of 1935 is compared to the bill as introduced in 1934. The Rayburn Bill, HR 6836, 73d Cong., 2d Sess., contained a provision in § 17 (b) (now § 322 (b)) allowing not only the Commission but "any party injured" to apply to the district court for relief from violations of the chapter. The language "or any party injured" was left out of the final act. Subsequently, in 1954 HR 8238, 83d Cong., 2d Sess. was introduced to amend 49 U.S.C. § 322 (b) by adding after the word Commission the words, "or any motor carrier which is being, or will be injured by such violation." This bill was not enacted.

The absence, therefore, of a provision conferring a right of action on private parties to enforce provisions of the Motor Carrier Act is not accidental, but evidence of Congressional intent to withhold such a right of action from private parties and to leave enforcement to the Interstate Commerce Commission.

The cases in which the courts have provided remedies to effectuate Congressional intent are inapposite

here. In *J.I. Case Co.* v. *Borak,* 377 U.S. 426, this Court held that § 27 of the Securities Exchange Act authorized a federal cause of action for damages by a private party for an alleged violation of § 14 (a) of the Act relating to proxies. Even though the Act contained no specific provision for a private right of action, it did condemn as unlawful the practices alleged in the complaint. Thus, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Id. at 433. *Bell* v. *Hood,* 327 U.S. 678, 684.

Here, the Motor Carrier Act does not in terms provide a general right to sue for alleged violations thereof. Congress has refused to provide such a right. As stated in the Solicitor General's Memorandum (p. 6) in the prior petition for certiorari, No. 492, October Term, 1965, 382 U.S. 912, "a federal damages remedy here would largely duplicate the State remedy of a suit for breach of the management agreement and that neither the language nor legislative history of § 310a (b) affirmatively discloses an intent to protect persons harmed by the breach of such agreements."

The absence of a federal damages remedy in the Motor Carrier Act was determinative in *Consolidated Freightways, Inc.* v. *United Truck Lines, Inc.,* 216 F.2d 543 (9th Cir. 1954), certiorari denied, 349 U.S. 905. In a suit for money damages, the plaintiff, a certified motor carrier, claimed that the defendant violated the Motor Carrier Act by operating without an ICC certificate, and that the federal court had jurisdiction to infer a private remedy. The court refused to infer a private remedy and stated that:

> "Part II makes provision only for criminal penalties and injunctive remedies to be sought by the Commission. In contrast with Part I, Part II is silent as to any private remedy for a violation of any of its provisions. This omission is significant, and persuades us that Part II is to be regarded as a wholly independent legislative enactment in which Congress deliberately elected to provide no remedies for violation of any of its provisions other than those carefully spelled out in Part II itself." Id. at 545.

The recent amendments to the Motor Carrier Act, Act of September 6, 1965, 79 Stat. 648, provide a private right of action limited to recovery for unreasonable and discriminatory charges by motor carriers and to enjoin "clear and patent violation" of the licensing requirements. 1965 U.S. Code Cong. & Ad. News 2923, 2930-31. The instant case does not fall within either of the exceptions created by Congress. In denying a private right of action in this case based upon the Act as amended, the court below stated that: "With the legislature so cautious in granting a limited private right of action against an admitted evil, it is hard to conclude that Congress meant to bestow an unlimited one in a complex and debatable area as to which there had been no complaint." *McFaddin Express, Inc.* v. *Adley Corp.*, — F2d —, ———— (2d Cir. 1966).

III

The complaint does not assert a claim requiring construction of the Interstate Commerce Act and state law governs the claims.

The claims of the petitioners arise under state law even though the contracts required ICC approval to be carried out. In this regard the District Court of Connecticut in the first action, *McFaddin Express, Inc. v. Adley Corp.*, 240 F. Supp. 791 794-95, said:

> ". . . In all of its essential features the case made by the plaintiffs' complaint is based upon contracts negotiated at arms length in the open market, and they owed nothing to federal legislation. Every question which is raised depends for decision upon conventional local or general common law concepts and doctrines of damages applicable in suits to enforce purely private rights. In construing the contracts, it might be found expedient or even necessary to refer to or consult the statutes upon which the applications to the ICC for permission to merge and to temporarily operate McFaddin were based, which are referred to in the complaint, and with some reference to which the contracts appear to have been executed. But, as stated in *St. Paul, M. & M. Ry.* v. *St. Paul & No. Pac. R. R.*, 68 Fed. 2, 13 (8th Cir. 1895), aff'd by consent, 18 S. Ct. 946, 42 L.Ed. 1212 (1897), where a similar issue of federal question jurisdiction was decided adversely to the plaintiff—
>
> '[A]fter all, the point at issue upon this

> branch of the case is the true construction of that agreement, and that is clearly a question of general and local law, inasmuch as the right asserted by the plaintiff depends upon that agreement, and the local statute by which it was adopted and confirmed. A case does not become one of federal cognizance because it may be found necessary, in construing a private contract or a local law from which the rights of the respective parties are derived, to consult some federal statute with a view of ascertaining the meaning of the contract or the scope and effect of the local law. In such cases the cause of action or the defense, as the case may be, is not founded on a law of the United States in any such sense as to bring the suit within the jurisdiction of the federal courts'."

As Judge Friendly phrased it for the Second Circuit:

> ". . . we cannot find that plaintiffs have here shown that federal principles should supersede state law in any respect relevant to this case. That the contracts could not lawfully be carried out save with ICC approval does not, without more, demonstrate that Congress meant all aspects of their performance or non-performance to be governed by law to be fashioned by federal courts rather than by the state law applicable to similar contracts relating to businesses not under federal regulation." 346 F. 2d 424, 427 (2d Cir. 1965).

The opinion of the Second Circuit cited its recent decision of *T. B. Harms Co.* v. *Eliscu,* 339 F. 2d 823. The facts of that case showed that there had been assignments of rights in renewal copyrights and the

purported sole owner had recorded an instrument in the Copyright Office purporting to be an assignment of renewal copyrights. There was no diversity of citizenship. Citing a long line of Supreme Court cases, the opinion held that the critical issue involved was whether the defendant-assignor had made a prior assignment. The real question was the title to the copyrights. In deciding that this was a question of local law, the opinion said:

> "To take one of many examples, the Court said in *New Marshall Engine Co.* v. *Marshall Engine Co.*, 223 U.S. 473 . . .:
>
> > 'The Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy. For courts of a state may try questions of title, and may construe and enforce contracts relating to patents. *Wade* v. *Lawder,* 165 U.S. 624, 627, 41 L.Ed. 852, 17 Sup. Ct. Rep. 425.'
>
> "Just as with western land titles, the federal grant of a patent or copyright has not been thought to infuse with any national interest a dispute as to ownership or contractual enforcement turning on the facts or on ordinary principles of contract law." 339 F. 2d at 826.

Pan Am. Corp. v. *Superior Court,* 366 U.S. 656—A natural gas pipeline company had a contract with two natural gas producers for transportation in interstate commerce. The Kansas Corporation Commission ordered it to pay a higher price for the gas than was stipulated in the contract. It paid the higher price under protest; it challenged the validity of the

order and the order was later held invalid. It then sued in the Superior Court of Delaware to recover the overpayments, claiming alleged contracts to refund the overpayments in the event that the order should be held invalid, and also claiming restitution of the overpayments on the ground of unjust enrichment.

The producers claimed that the state court lacked jurisdiction because under the Natural Gas Act the prices to be paid must be in accordance with the rates filed with the Federal Power Commission. The producers petitioned the Supreme Court of Delaware for a writ of prohibition to prevent further proceedings before the Superior Court. The petition was denied. The Supreme Court of the United States affirmed,[3] with Justice Frankfurter writing for a unanimous court. The following appears in 366 U.S. at 662-665:

> "But questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court—on how he casts his action. Since 'the party who brings a suit is master to decide what law he will rely upon,' *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25, the complaints in the Delaware Superior Court determine the nature of the suits before it. Their operative paragraphs demand recovery on alleged contracts to refund overpayments in the event of a judicial finding that the Kansas minimum-rate order was invalid, or for restitution of the overpayments by which petitioners have

allegedly been unjustly enriched under the compulsion of the invalid Kansas order. No right is asserted under the Natural Gas Act.

"The suits are thus based upon claims of right arising under state, not federal law. It is settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, unless it appears from the face of the complaint that determination of the suit depends upon a question of federal law. See, *e.g., Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667, 672, and cases cited. Apart from diversity jurisdiction, 'a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . .' *Gully* v. *First National Bank,* 299 U.S. 109, 112-113. . . .

"The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas. What was said in *Gully* v. *First National Bank,* 299 U.S., at 116, is apposite:

> 'We recur to the test announced in *Puerto Rico* v. *Russell & Co., supra*: "The federal nature of the right to be established is decisive—not the source of the authority to establish it." Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source

of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. Co.* v. *Mottley, supra.* With no greater reason can it be said to arise thereunder because permitted thereby.'

"We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive.

"Nor does § 22 of the Natural Gas Act help petitioners. 'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded. This was settled long ago in *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U.S. 255, a case involving a grant of exclusive jurisdiction to the federal courts in all cases arising under the patent laws. Suit was brought in a state court on a common-law contract claim. The complaint contained no mention of a patent, but the invalidity of certain patents was set up in defense. In response to the argument that this deprived the state courts of jurisdiction, the Court said:

'Section 711 [the jurisdictional provision]

does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *"cases"* arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals.' (Emphasis in the original.) 168 U.S., at 259.

"Petitioners contend that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established through the Natural Gas Act. Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions."

Respondents contend that the complaint does not assert a claim requiring construction of the Interstate Commerce Act in any way material to this case and therefore there is no jurisdiction under either 28 U.S.C. §1331(a) or under 28 U.S.C. §1337. As pointed out by the court below:

"Nothing in the complaint indicates that determination whether it [Adley] breached this agreement will require construction of the Interstate

Commerce Act. Contrast *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950)" *McFaddin Express, Inc.* v. *Adley Corp.*, — F. 2d —, ——— (2d Cir. 1966).

The Second Circuit's first opinion pointed out that "'implication' of a federal remedy is hardly automatic, particularly where an agency occupies the field." *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F. 2d 424, 426 (2d Cir. 1965). In this case the ICC noted: "it is well established by Commission precedent that matters of controversy arising between the parties under private contracts must be left for settlement by the parties themselves or the courts." 87 M.C.C. at 667. On the prior petition for certiorari, No. 492, October Term, 1965, the Solicitor General was asked to express the views of the United States. *McFaddin Express, Inc.* v. *Adley Corp.*, 382 U.S. 912. In his memorandum (p. 5) he stated: "On the other hand, the problem appears not to be one of great frequency or importance, and the government agency most directly concerned—the Interstate Commerce Commission—does not believe that the result reached by the court below is demonstrably unsound or that review by this court is warranted. In denying approval of the proposed consolidation here, the Commission indicated its view that disputes over temporary control under § 310a (b) ordinarily do not involve questions of importance from the standpoint of national transportation policy, and therefore are more appropriately left to private adjustment under local law. . . . Accordingly, the Commision perceives no need to recognize a federal cause of action, at least where (as in the present case) the Commission's §310a (b) order does not in terms command obedience

to, albeit it predicates Commission approval upon, the terms and conditions of the management agreement."

Thus, the correct decision of the merits in this case does not depend on the construction of the Interstate Commerce Act, but rather on state law, *State Automobile Ins. Ass'n* v. *Parry,* 123 F. 2d 243, 246 (8th Cir. 1941), and therefore the claimed right will neither be supported by one construction of the Act nor defeated by another construction of the Act. Cf. *Wheeldin* v. *Wheeler,* 373 U.S. 647.

IV

Res judicata prevents re-litigation of the claim that 49 U.S.C. § 310a was violated and therefore no claim of a violation of 49 U.S.C. § 5 resulting from violation of § 310a can be entertained.

The first decision of the Second Circuit adjudged that there was no violation of 49 U.S.C. § 310a. The petitioner still persists in claiming that 49 U.S.C. § 5 was violated because § 310a was violated. He is foreclosed under principles of res judicata from now claiming the same § 310a violation and thus he is foreclosed from claiming a § 5 violation on this predicate.

Despite the final adjudication of the § 310a question in the first opinion of the Second Circuit, the petitioners' "questions presented" numbers 3 and 5 persist in seeking to again raise this point for review. Actually the petitioners' question 1 raises the same point since it admits that their claim of violation of

49 U.S.C. § 5 presupposes a violation of the temporary control order of the ICC under 49 U.S.C. § 310a. In questions 2 and 4, the petitioners raise the point of a § 5 violation but each time omit the salient premise that their claim is founded upon the violation of the § 310a order.

Thus, no matter how tortuously the petitioners strive to evade the issue, they cannot ignore the basic premise that all their grounds are bottomed on a claimed violation of 49 U.S.C. § 310a as to which the Second Circuit spoke finally when it stated flatly that Adley "has disobeyed no express command of the ICC." *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965). As a matter of fact the petitioners in their petition for writ of certiorari (p. 7), admit that the prior action based federal jurisdiction on the violation of the temporary control order under 49 U.S.C. § 310a. This prior action is now a final judgment. Contrary to the petitioners' contention in their petition (p. 9), it is not "conceded" that Adley violated the § 310a order thereby bringing it within the prohibition of 49 U.S.C. § 5. In fact, as pointed out above, the first decision of the Second Circuit specifically held that Adley did not violate any command of the ICC. This question, respondents contend, cannot now be relitigated. The salutary doctrine of res judicata prevents it.

The doctrine of res judicata ". . . prevents relitigation of all grounds for, or defenses to, recovery that were then available to the parties before the particular court rendering the judgment in relation to the same claim—regardless of whether all grounds for recovery or defenses were judicially determined." 1B *Moore's*

Federal Practice, Para. 0.405 [1], at 622 (2d ed. 1965). As Professor Moore indicates, the doctrine of res judicata applies to questions of federal jurisdiction as well as a judgment on the merits:

> "As previously pointed out a valid final judgment on the merits is res judicata as to the cause of action involved, and operates as collateral estoppel on relevant and material issues then decided. But the underlying policy of res judicata is not restricted to a valid judgment that deals solely with the merits; it extends to and includes matters in abatement, such as jurisdiction of the subject matter, federal jurisdiction, jurisdiction over the res, jurisdiction over the defendant, venue, and related matters.
>
> "In *American Surety Co.* v. *Baldwin,* [287 U.S. 156, 166] Mr. Justice Brandeis stated:
>
> > 'the principles of *res judicata* apply to questions of jurisdiction as well as to other issues.' "

1B *Moore's Federal Practice* Para. 0.405 [5], at 655 (2d ed. 1965) (footnotes omitted).

This court in *Jackson* v. *Irving Trust Co.,* 311 U.S. 494, firmly established that the doctrine applies to the issue of jurisdiction. In that case, a judgment had been obtained against the alien property custodian and had not been appealed. The district court had jurisdiction if the plaintiff was not an "enemy" alien. Years later, the government moved on affidavits to set aside the decree, alleging that the court had been without jurisdiction to entertain the action as the plaintiff was an "enemy" alien. The government's motion was granted by the District Court but the

Circuit Court of Appeals reversed and reinstated the original decree. On review this Court affirmed the action of the Circuit Court of Appeals and held that this determination was finally adjudicated, stating, "and whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree." 311 U.S. at 503. This Court pointed out that if the original judgment which necessarily determined jurisdiction had been erroneous the only remedy was by way of appeal.

In *Hicks* v. *Holland,* 235 F.2d 183 (6th Cir. 1956), certiorari denied, 352 U.S. 855, the Circuit Court affirmed the decision of the district judge who dismissed the complaint *sua sponte.* The records of the United States District Court showed that a complaint covering the same subject matter and parties had been dismissed by one of the judges of that court for lack of jurisdiction and, therefore, the prior dismissal on jurisdictional grounds brought this action within the principle of res judicata.

In *Ripperger* v. *A. C. Allyn & Co.,* 113 F. 2d 332, (2d Cir. 1940), certiorari denied, 311 U.S. 695, a case involving federal venue, the court stated:

> "No reason is apparent why the rule should be less applicable to a decision denying jurisdiction than to one sustaining it," 113 F. 2d at 333.

The respondents claim that the jurisdictional issue, that is, "the non-merits judgment", is final as to the lack of federal jurisdiction. The determination of the jurisdictional question in the prior suit is conclusive because there was full opportunity to litigate all as-

pects of that question. As this Court stated in *Heiser* v. *Woodruff*, 327 U.S. 726:

> "In general a judgment is *res judicata* not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit." 327 U. S. at 735.

It is abundantly clear that the alleged violation of 49 U.S.C. § 310a was raised and litigated in the first action. And, under the circumstances of this case as pointed out above, a claimed violation of 49 U.S.C. § 5 is necessarily predicated upon a violation of 49 U.S.C. § 310a. The allegation of a § 5 violation is not new to the instant action for in their petition for writ of certiorari in the first case (pp. 14-15), *McFaddin Express, Inc.* v. *Adley Corp.*, 382 U.S. 1026, petitioners stated that the allegations of the complaint in that case "clearly" suggested a § 5 violation and that the Second Circuit "erred in excluding consideration of this factor. . . ." It is without question that the grounds upon which petitioners have predicated federal jurisdiction were raised in the earlier case, although the alleged violation of 49 U.S.C. § 5 was not decided therein.

As Professor Moore points out:

> "The doctrine of res judicata is not a technical rule, but a rule of fundamental repose for both society and litigants. Its salutary principle 'is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case,

> is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court.' The doctrine prevents an encore and 'reflects the refusal of law to tolerate needless litigation.' And subsequent litigation is needless if, by fair process, a party over whom the court had jurisdiction raised or had an opportunity to raise issues that were a part of the cause of action previously dealt with."

1B *Moore's Federal Practice* Para. 0.405 [1], at 628 (2d ed. 1965). (footnotes omitted.)

The doctrine does no injustice. It is based upon common sense. Otherwise, the petitioners could keep themselves in the United States District Court forever by bringing successive actions, in each of which they might allege that the identical facts are a violation of some other federal statute or a violation of another pre-existing ICC order. The petitioners have a proper forum for their contract claims in the Superior Court of Connecticut, where their suit is pending. The adverse determination of their claim of federal question jurisdiction does not foreclose a hearing on the merits in a court which does have jurisdiction of the controversy, if that is what they truly seek.

V

An allegation by one motor carrier of a violation of 49 U.S.C. § 5 by another motor carrier does not furnish the basis of Federal Question Jurisdiction.

Contrary to the petitioners' claim that the Second Circuit in the majority opinion took the position that Adley violated 49 U.S.C. § 5 (petition p. 10), that court did not find that 49 U.S.C. § 5 was violated. It held that "no private right of action against a motor carrier for violation of § 5 (4) exists." *McFaddin Express, Inc.* v. *Adley Corp.*, — F.2d —, ——— (2d Cir. 1966). The petitioners also claim that Judge Lumbard in the concurring opinion found that 49 U.S.C. § 5 conferred a private right of action "here". (petition p. 11) Such is not the case. It is clear that Judge Lumbard held that a private right of action is predicated upon finding a violation of 49 U.S.C. § 310a. The first decision of the Second Circuit held that § 310a had not been violated, and Judge Lumbard held below that "the ICC granted an exemption from § 5 pursuant to § 310a" and he did not find "any statutory private right of action for such a suit." Id. at ——. Thus, how could he have found that 49 U.S.C. § 5 conferred a private right of action "here"?

The argument that the provisions of 49 U.S.C. §§ 8 and 9 apply here to confer a private right of action in favor of a motor carrier under the circumstances of this case must fail for the reasons set out in the majority opinion below. It should be noted *in limine* that §§ 8 and 9 of Part I of the Interstate Commerce

Act are not included within Part II of the Interstate Commerce Act, 49 U.S.C. §§ 301-327, the Motor Carrier Act.

As Judge Friendly held below, the

> ". . . inclusion of motor carriers in § 5 [was] part of the 1940 legislation establishing a National Transportation Policy, 54 Stat. 899, and adopting Part III of the Interstate Commerce Act relating to water carriers. The desire of the draftsmen to have a single comprehensive provision relating to consolidation of all three forms of transportation rather than being obliged to frame separate sections for each Part of the Interstate Commerce Act *would not suggest any legislative purpose to provide a private remedy for unlawful control by a motor carrier that had previously been withheld.* . . . Indeed, in view of the legislative concern over too much competition in the motor carrier industry and the need for effective limitations, . . . it would have been a strange reading to say that by the 1940 amendment Congress provided a private right of action for unlawful combination although it refused in 1949 and again in 1957, see *T.I.M.E. Inc., supra*, 359 U.S. at 471-73, to provide one against unlicensed operation or to give shippers by motor carrier a cause of action for unreasonable or discriminatory rates. (emphasis added)

The opinion goes on to discuss the 1965 amendments to the Motor Carrier Act, *supra* p. , and concluded by holding that:

> "On the other hand, if, as we think clear, no

> private right of action for violation of § 5 (4) by a motor carrier existed prior to 1965, we ought not to assume a desire to change this in the absence of some indication of Congressional intent, and neither the language of the 1965 amendment nor the legislative history affords this. . . .
>
> With the legislature so cautious in granting a limited private right of action against an admitted evil, it is hard to conclude that Congress meant to bestow an unlimited one in a complex and debatable area as to which there had been no complaint. Pending further explication of legislative purpose, it thus seems best to continue to read §§ 8 and 9 in a manner which accords equally well with the language, namely, that *these sections concern only violations of Chapter 1 by carriers generally subject to its provisions, to wit, those, primarily railroads, to which § 1 (1) says 'the provisions of this chapter shall apply.' Hence, in the absence of provision in Title II, no private right of action against a motor carrier for violation of § 5 (4) exists.*"

McFaddin Express, Inc. v. *Adley Corp.*, — F.2d —, ——— (2d Cir. 1966). (emphasis added).

In *Riss & Co.* v. *Association of American Railroads*, 178 F. Supp. 438 (D.D.C. 1959) in answer to allegations of competitive injury resulting from unlawful control of one motor carrier by another in violation of 49 U.S.C. § 5 (4) the court held:

> "that these counterclaims do not state a claim upon which relief may be granted. . . . Defendants cite no case in which an action for damages

alleging injury as a result of a violation of Section 5 (4) by a motor carrier has been brought, either under the Interstate Commerce Act or at common law. As in the case of the counterclaims alleging injury as a result of operation in excess of authority, the court holds that *to allow a common-law action for damages for violation of Section 5 (4) by a Motor Carrier would be contrary to the intent of Congress.*" (emphasis added) 178 F. Supp. at 446.

From the foregoing it is clear that Congress has not provided a private right of action in damages for the alleged unlawful control of one motor carrier by another, and petitioners should be left to pursue their pending breach of contract action in the Connecticut court.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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